

## DOCKET SECTION

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PRESIDING OFFICER'S  
RULING NO. R97-1/60

POSTAL RATE COMMISSION  
OFFICE OF THE SECRETARY

UNITED STATES OF AMERICA  
POSTAL RATE COMMISSION  
WASHINGTON, D.C. 20268

Postal Rate and Fee Changes

Docket No. R97-1

### PRESIDING OFFICER'S RULING ON BOTH ASSOCIATION OF ALTERNATE POSTAL SYSTEMS AND POSTAL SERVICE'S MOTIONS FOR RECONSIDERATION OF PRESIDING OFFICER'S RULINGS NOS. R97-1/46 AND 1/52

(November 13, 1997)

On October 21, the Postal Service filed a motion requesting partial reconsideration and clarification of several portions of Presiding Officer's Ruling No. R97-1/46, which in relevant part granted the Association of Alternate Postal System's (AAPS) motion to compel a response to its Interrogatory AAPS/USPS-6, regarding the existence of an alternate delivery study.<sup>1</sup> Motion of United States Postal Service for Partial Reconsideration and Clarification of P.O. Ruling No. R97-1/46, October 21, 1997 (Motion of USPS). P.O. Ruling No. R1/52, issued on October 23, clarified its mandate that the Postal Service provide the underlying *factual* data from the ongoing SAI alternate delivery study by specifically excluding provision of both the SAI researchers' and Postal Service's comments and conclusions on, and analysis and/or interpretation of that data, as well as the company and product names of alternative delivery providers. P.O. Ruling R97-1/52 at 3. Proposed amendments to the associated

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<sup>1</sup> Specifically, the AAPS interrogatory asks if the Postal Service has "conducted or commissioned a study on alternate delivery since the SAI [Strategic Analysis, Inc.] report revealed during the course of Docket MC95-1," and, if so, to provide a copy of such study or report, or a description of any work in progress. AAPS/USPS-6.

protective conditions also were approved. *Id.* However, the Postal Service's request for reconsideration of that portion of P.O. Ruling R97-1/46 requiring production of the SAI researchers' conclusion about the market's reaction to a price change was reserved pending AAPS's answer, with a proviso that the Postal Service may withhold this specific information in the interim. *Id.*

On October 28, AAPS responded<sup>2</sup> to the Postal Service's argument that the SAI researchers' conclusions about the market's reaction to a change in price should not be subject to disclosure as it is not factual, but rather is confidential, predecisional analysis within the realm of privileged, nonpublic material. See Motion of USPS at 2. AAPS counters that such opinions by the SAI researchers are part of the factual information considered by postal management, and are more appropriately considered as "input" into the deliberative process. Answer of AAPS at 2-3. Consequently, while it would reveal how the SAI researchers interpret information, disclosure of the SAI conclusions would not necessarily divulge postal management thought processes, thereby violating the deliberate process privilege invoked by the Postal Service. Extending that rationale, AAPS now requests reconsideration of the Presiding Officer's ruling that SAI's comments and conclusions on, and their analysis and/or interpretation of, all underlying factual data,<sup>3</sup> may be excluded from disclosure by the Postal Service. *Id.* at 1-3. According to AAPS, "[t]he bare data without the analysis thereof will undoubtedly give little or no information about the information available to postal management when it decided to propose rate reductions for the most competitive portion of ECR mail." *Id.* at 2.

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<sup>2</sup> Answer of Association of Alternate Postal Systems to Motion for Reconsideration and Clarification by the United States Postal Service and Request for Reconsideration of P.O. Ruling No. R97-1/52, October 28, 1997 (Answer of AAPS).

<sup>3</sup> AAPS does not challenge the Presiding Officer's original ruling excluding SAI's recommendations from the material to be disclosed, reluctantly accepting that exclusion as "close to the line of the deliberative process." Answer of AAPS at 1-2.

The Postal Service's November 5 response to the Answer of AAPPS, with its request for reconsideration, objects to AAPPS's characterization of the SAI researchers' analyses as comprising the "factual information" considered by postal management. Response of United States Postal Service to Association of Alternate Postal Systems Request for Reconsideration on P.O. Ruling R97-1/52 (Answer of USPS) at 2. Rather, the Postal Service contends that the information at issue is "plainly deliberative in character . . . properly equated with inter-agency deliberation," and likely to have an impact on future Postal Service market strategies. Answer of USPS at 4. Moreover, according to the Postal Service, the fact that the analyses were prepared by outside consultants is of no consequence. *Id.* at 3. See also *CNA Financial Corp. v. Donovan*, 830 F.2d 1132, 1161-62 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 977 (1988).

The deliberative process privilege protects certain opinions and recommendations underlying governmental decisions — i.e., predecisional deliberations — from disclosure, thereby encouraging candor among those advising decisionmakers, with open discussion of legal and policy issues:

Manifestly, the ultimate purpose of this long-recognized privilege is to prevent injury to the quality of agency decisions. The quality of a particular agency decision will clearly be affected by the communications received by the decisionmaker on the subject of the decision prior to the time the decision is made.

*N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975). See also *In re Sealed Case*, 116 F.3d 550, 557-58 (D.C. Cir. 1997); *Mapother v. Department of Justice*, 3 F.3d 1533, 1537 (D.C. Cir. 1993); *Wolfe v. Department of Health and Human Services*, 839 F.2d 768, 773-74 (D.C. Cir. 1988). In addition to ensuring free communication of agency subordinates' uninhibited opinions and recommendations to the decisionmaker, the deliberative process privilege protects against both "premature disclosure of proposed policies before they have been finally formulated or adopted," and "confusing the issues and misleading the public by dissemination of documents suggesting

reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency's action." *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). Applicable communications from third parties also are protected; "[I]f information communicated is deliberative in character it is privileged from disclosure, notwithstanding its creation by an outsider." *CNA Financial Corp.*, 830 F.2d at 1161-62 (citations omitted).

But, while "analysis and evaluation of facts are as much a part of the deliberative process as analysis and evaluation of law," the deliberative process privilege significantly does not shield purely factual, investigative material from disclosure.<sup>4</sup> *Skelton v. U.S. Postal Service*, 678 F.2d 35, 38 (5<sup>th</sup> Cir. 1982). See also *Environmental Protection Agency v. Mink*, 410 U.S. 73, 87-89 (1973); *In re Sealed Case*, 116 F.3d at 558; *Petroleum Information Corp. v. U.S. Dept. of Interior*, 976 F.2d 1429, 1434 (D.C. Cir. 1992). Moreover, the deliberative process privilege is a qualified privilege, and thus may be overridden if "the need for the evidence outweighs the interests that support the privilege. 26A Wright & Graham, *Federal Practice and Procedure* § 5690 at 240, 243 (1992).

In the instant case, there is no longer an issue of the Postal Service's provision of an approved version of the SAI research for examination by interested parties. What remains in contention, and is the subject of both pending motions for reconsideration, is whether the redacted submission of underlying data, with its deletion of the SAI researchers' analysis and interpretation of underlying facts, conclusions and recommendations, complies with the legal provisions discussed herein. I believe that the distinctions made in P.O. Ruling R97-1/46 comport with the spirit of the law, and that the deliberative process privilege was appropriately applied to the facts at hand. There is no manifest need to circumvent this qualified privilege.


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<sup>4</sup> An exception may be made if the purely factual material is "so inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably reveal the government's deliberations." *In re Sealed Case*, 116 F.3d at 558.

Careful review of the SAI research at issue, in its redacted library reference version, indicates sufficient information to draw conclusions on a number of salient points, including: (1) the number of alternate delivery competitors; (2) the amount of advertising and product samples comprising the market; (3) the market shares of the Postal Service and its competitors (although it is acknowledged that an analyst would have to combine information from the SAI report with data from RPW or the billing determinants to determine the respective market shares); and (4) the reaction of competitors to Postal Service rate changes. In light of this circumstance, and the supporting case law, I am unpersuaded by AAPS's arguments characterizing the SAI analysis, interpretation and conclusions as part of the factual information and mere "input" into the Postal Service's deliberative process, and am particularly at odds with AAPS's conclusion that the redacted SAI report sheds little or no light on the information available to postal management in developing rates for ECR and other mail. I accordingly find no compelling rationale to support disclosure of SAI researchers' opinions about the market's *prospective* reaction to a change in price. However, to the extent that SAI's comments describe the industry's *past* reactions to price change (i.e., the past downsizing or closing of an alternate delivery provider due to price change), they are factual in nature and should be disclosed under the provided protective conditions. This holding is thus consistent with P.O. Ruling No. R97-1/46.

#### RULING

1. The Motion of the United States Postal Service for Partial Reconsideration of P.O. Ruling No. R97-1/46, filed October 21, 1997, is denied.
2. The Motion of the Association of Alternate Postal Systems for Reconsideration of P.O. Ruling No. R97-1/52, filed October 28, 1997, is denied.



Edward J. Gleiman  
Presiding Officer